

1 IN THE UNITED STATES DISTRICT COURT

2 DISTRICT OF UTAH

3 CENTRAL DIVISION

4  
5 XMISSION, L.C., a Utah company, )

6 Plaintiff, )

7 vs. ) Case No. 2:15-CV-277-TC

8 ADKNOWLEDGE, INC., a Missouri )

9 Corporation; DOES 1-40, )

10 Defendants. )

11 \_\_\_\_\_)

12  
13 BEFORE THE HONORABLE TENA CAMPBELL

14 -----

15 May 5, 2015

16 Status Conference/Motion for TRO

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23  
24 REPORTED BY: Patti Walker, CSR, RPR, CP

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## A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH; TUESDAY, MAY 5, 2015; 10:00 A.M.

2 PROCEEDINGS

3 THE COURT: We're here in XMission vs.  
4 Adknowledge, here in a combination of status and motion for  
5 TRO that was filed by XMission.

6 Representing XMission is Mr. Schmutz, Mr. Cameron,  
7 Mr. Ashdown and Mr. Webster. For Admission, we have  
8 Ms. English, we have Mr. Newman, we have Mr. Herbst, and we  
9 have -- is it Ms. Dunyon?

10 MS. DUNYON: Yes.

11 THE COURT: There is sort of the minor-est of  
12 conflicts, but it's the best I could do. My clerk,  
13 Ms. Rice, has XMission. However, when I went to my other  
14 clerk, she is going to return -- she's been working for Snow  
15 Christensen, and she's going to return. So it was the  
16 lesser of two conflicts. If down the road I can assure  
17 you -- I don't think that makes much difference, but if you  
18 feel that that is a conflict that has to be resolved, let me  
19 know and I can simply do this on my own, but everybody's  
20 results. It's going to be slower and less good without  
21 Ms. Rice, I will tell you that.

22 I know, Admission, that you received notice very  
23 late. That's because this -- as TROs go, they always come  
24 in fast. Generally I do not grant TROs. I simply have a  
25 status. However, I was struck by the number of spam e-mails

1 and customer complaints that, according to XMission, it had  
2 received in the ten days before it filed its motion. And  
3 that inclines me, to some degree, although I have so many  
4 questions, to try and reach some sort of an agreement that  
5 will stop it before I can have a full-blown evidentiary  
6 hearing.

7           And I know, Admission, you say that because of  
8 some encryption problems, you are unable to simply stop  
9 activity that goes on to XMission. You would have to stop  
10 down your whole operation. I'm no technical expert, but I  
11 found that somewhat strange. But I've got that definitely  
12 in my mind.

13           Having said that, what I want you to do, XMission,  
14 is to do what I think is somewhat familiar to you. You have  
15 done that before, Mr. Schmutz, I know you have, with ZooBuh.  
16 You walked Judge Nuffer through the process of what you  
17 think is happening, how you think Admission is somehow  
18 either procuring transmissions or being a transmitter  
19 itself, irreparable harm, et cetera. If you had to start at  
20 the beginning with Judge Nuffer, let me tell you your job is  
21 doubly hard with me. Okay.

22           Then I'm going to ask the same of you, Admission.  
23           Who's going to start?

24           MR. SCHMUTZ: Mr. Cameron will argue for XMission  
25 on this. We should correct the record, both of us noticed,

1 the defendant's name is Adknowledge.

2 THE COURT: See, already your work is cut out for  
3 you, isn't it? Adknowledge. Adknowledge. Sure it is.

4 Go ahead, please.

5 MR. CAMERON: Thank you, Your Honor.

6 If it pleases the Court, there are a few points  
7 that are directly related to your questions that I would  
8 like to outline at the outset that directly go to  
9 specifically the procurement question as well as the harm  
10 element here.

11 And I think to best address that, it would behoove  
12 the Court to identify specifically issues that are not in  
13 dispute that directly relate to the questions that this  
14 Court may have. And in reviewing the written memoranda,  
15 both that we filed and Adknowledge filed, as well as  
16 comparing the submitted declarations which were submitted,  
17 appropriately, under oath, the Court can reach certain  
18 conclusions on relevant material issues that are not in  
19 dispute.

20 The first of those is that XMission is a bona fide  
21 Internet service provider. That question is not in dispute.  
22 The question that was raised, which this Court identified,  
23 is to what extent XMission is adversely affected or, more  
24 particularly, with reference to the TRO standard, to what  
25 extent they will be irreparably harmed.

1           THE COURT: And I carefully read and I compared it  
2 to the Gordon case. It seems to me that -- but that wasn't  
3 in the context of a TRO. It seems to me, given the amount  
4 of resources you devote, given your size, to the prevention  
5 of spam, and the dollar amount and the amount of customer  
6 complaints, although I don't know really that I have a basis  
7 for that, that might be hearsay, I could see that you are  
8 irreparably harmed. The irreparable harm that I am  
9 primarily worried about now is in the ten days that would  
10 last.

11           MR. CAMERON: I appreciate that clarification  
12 because, as this Court aptly points out, there's a harm  
13 standard for standing, which, from what I understand this  
14 Court is saying, that's essentially satisfied here.

15           THE COURT: I think so, although I'm sure we're  
16 going to hear differently, and then you might have to answer  
17 questions.

18           MR. CAMERON: I would agree with this Court that  
19 it is and I can rebut any argument that's raised. So I will  
20 forgo any argument on that point right now.

21           With respect to the irreparable harm for purposes  
22 of a TRO, if I may identify some other issues that are not  
23 in dispute that will directly associate and relate to that,  
24 and this is important for the Court to take note of.

25           The memorandum in opposition that was filed by

1 Adknowledge does not dispute or challenge our analysis  
2 regarding violations of the CAN-SPAM Act. They simply state  
3 we don't have the e-mails, so we can't make an assessment.  
4 However, they ignore the fact that we provided adequate  
5 summaries, all of the relevant data in summary fashion, and  
6 a significant analysis of four different violations of the  
7 law. The Court can conclude, based on the absence of  
8 challenge to that analysis, that --

9 THE COURT: What did your analysis -- I saw the  
10 analysis, but when I went into your exhibits, it seemed  
11 mostly kind of numerical. Do you have examples of some --

12 MR. CAMERON: I do, and perhaps that's a function  
13 of the failure to adequately explain what the exhibits are  
14 actually showing. For the benefit of the Court, we do have  
15 and have preserved every single one of these e-mails in its  
16 original format. That is 65,000 e-mails.

17 I can also represent to the Court that as of the  
18 date of filing, the complaint as well as this TRO, we had  
19 not, given the sheer amount of resources it requires,  
20 analyzed and processed every single potential e-mail that  
21 could be associated with Adknowledge. However, I requested  
22 one of the technical associates with XMission to do an  
23 expedited review to the extent he could. I can represent to  
24 the Court that as of last night, e-mails that I received  
25 around midnight last night, they have identified an

1 additional 60,000 e-mails that contain Adknowledge links  
2 that were transmitted primarily in the month of March.

3 THE COURT: You're talking 120,000?

4 MR. CAMERON: 120,000. And we've not yet  
5 identified or even been able to analyze more than the tip of  
6 the iceberg on e-mails received in April and have not even  
7 begun, other than the e-mails of which a customer complains  
8 and so they are at the forefront, to identify any e-mails in  
9 May. This is a colossal endeavor.

10 The second, we were retained by our client to  
11 analyze these e-mails and determine if they were violations.  
12 We began as expeditiously as possible. But it takes  
13 significant time to analyze 65,000 e-mails, let alone  
14 120,000, potentially 180 -- possibly 200,000 e-mails over a  
15 short period of time.

16 THE COURT: What told you that these are linked to  
17 Adknowledge?

18 MR. CAMERON: The primary basis upon which we  
19 reached that conclusion is the link within the e-mail itself  
20 that does identify Adknowledge, which is not in dispute.  
21 Excuse me -- that's correct, Adknowledge.

22 THE COURT: Have I got you on the wrong word?

23 MR. CAMERON: It's Adknowledge. I was thinking  
24 Admission and I confused myself. That's okay. I think  
25 we're all clear now.



1           That's another point that I would like to identify  
2     for the Court that is an issue that is not in dispute, and  
3     that is fundamentally Adknowledge admits that it pays per  
4     click for every one of its links in the e-mails that is  
5     opened and that is clicked by the recipient. This is of  
6     primary importance in determining and answering the  
7     procurement question.

8           Specifically, the way Adknowledge describes this  
9     industry is correct. There are essentially three parties,  
10    four if you include the ISP that's receiving the  
11    transmission. The first party is the advertiser. Within  
12    the industry, the advertiser is identified as the party who  
13    wants to promote their product.

14           The second is the marketing network. Adknowledge  
15    admits that it is a marketing network.

16           The third component is a publisher. A publisher  
17    can take many forms, but essentially, and I believe  
18    Mr. Newman would agree, though he can correct the record if  
19    he doesn't, a publisher is essentially the party who  
20    directly controls the transmission of those e-mails.

21           Important to note, however, Your Honor, is the  
22    fact that within the definition section of the CAN-SPAM Act  
23    itself, under Section 7702, and I believe it's definition  
24    nine, which identifies initiator, the law recognizes that  
25    multiple parties can be considered to be an initiator of one

1 e-mail. And the law recognizes that because when the law  
2 was passed, it was recognized that this is the process, this  
3 is the system that is used to transmit the e-mails. Very  
4 rarely do we have a situation where the marketing network  
5 actually clicks send to transmit the e-mail.

6 In recognition of that, the law specifically  
7 identifies there can be multiple initiators. The law  
8 delineates liability between a sender and an initiator. The  
9 sender under the law is defined as a party whose product,  
10 service or Web site is promoted by the e-mail and who  
11 transmitted or procured the message.

12 THE COURT: In your three-party system, which one  
13 is going to be the sender?

14 MR. CAMERON: The advertiser primarily will be the  
15 sender.

16 There was some indication in the brief and in the  
17 supporting declarations filed by Adknowledge that they have  
18 somehow contractually altered the definition of sender and  
19 determined within their contracts that the publisher is the  
20 sender. I don't think you can contract around the statute.  
21 So I think this Court would conclude and I think the statute  
22 is clear that in this circumstance the advertiser would  
23 primarily be identified as the sender.

24 We don't have a sender here. We're not seeking to  
25 attribute liability to a sender at this stage because we

1 don't know who they are. Of course we'll gather that  
2 information in discovery and potentially add new parties to  
3 this case.

4           With respect to Adknowledge, they are an initiator  
5 as the second party in the chain that sets this process in  
6 motion. They're the ones who bring the advertiser and the  
7 publisher together. They contract with the advertiser to,  
8 in some cases, create, which I think they've admitted, that  
9 they have approved header information, approved from lines,  
10 approved unsub links, thereby participating in the creation  
11 of the e-mails, the creation of the advertisements.

12           They then turn the transmission over to their  
13 publishers, who actually click send. And when the links are  
14 clicked, Adknowledge is paid directly by the advertisers.  
15 That's how it earns its money. Then it turns around and  
16 pays a commission to the publishers. These are all admitted  
17 facts. None of this is in dispute. Within that context,  
18 the statutory definition of initiator directly corresponds  
19 to both Adknowledge and its publishers that are not  
20 identified, that are impossible, from our side of the table,  
21 to identify.

22           Of course the fourth party that is defined and  
23 that is material with respect to the CAN-SPAM Act would be  
24 the Internet service provider who receives the e-mail and  
25 who carries the burden of transmitting those. Of course

1 this Court recognizes that the individual consumer, the  
2 individual recipient does not have a private right of action  
3 under the law. The only party with a private right of  
4 action is XMission, and XMission is exercising its rights  
5 through this lawsuit.

6 One thing that's very important, and I would like  
7 to address the procurement argument in a little more detail  
8 in a moment, but to get there I think discussing the context  
9 of a TRO is highly valuable.

10 All we are requesting for purposes of a TRO and,  
11 for that matter, for purposes of a preliminary injunction is  
12 that Adknowledge comply with the law. Under 15 U.S.C. 7704  
13 (a)(5) -- or (a)(4), excuse me, it is prohibited to send an  
14 e-mail after an opt-out request is received. It is not in  
15 dispute that Adknowledge -- or, excuse me, that XMission  
16 attempted to unsubscribe from every single one of these  
17 e-mails. However, the e-mails continue on a daily basis,  
18 and the customer complaints, which are the result of a  
19 manual activity of the customer, contrary to what  
20 Adknowledge alleges. They have no knowledge on that. It's  
21 pure speculation on their part. Of course, at an  
22 evidentiary hearing, we'll present testimony on that.

23 The customer complaints are coming in every single  
24 day. Every single time these e-mails are received,  
25 customers are complaining about that. Adknowledge raises

1 the question --

2 THE COURT: What form is the complaint?

3 MR. CAMERON: The process by which -- and this is  
4 of course a proffer, Your Honor. I personally don't have  
5 personal knowledge, but I have interviewed my client about  
6 it. They have established a mechanism, which is  
7 technologically based, by which their customers can manually  
8 flag and identify messages as spam, as unwanted, and thereby  
9 submit a complaint to XMission about that.

10 It would be a colossal endeavor and cost  
11 prohibitive to require a company of XMission's size to staff  
12 a call center to take calls for every single customer  
13 complaint.

14 THE COURT: So when it comes to your client  
15 XMission, XMission will receive what?

16 MR. CAMERON: It might be better to ask  
17 Mr. Ashdown to answer this question. But my understanding  
18 and the data that we've analyzed is that they will receive a  
19 notice through an electronic means that this particular  
20 message has been flagged by the customer as spam and they  
21 are complaining of that e-mail. The record is then logged,  
22 and with those logged records, of which all of the data is  
23 stored on XMission servers and we can produce it to the  
24 Court, it's voluminous, it would most likely comprise 80,000  
25 plus pages of documentation, maybe more, with that data and

1 access to that data, we created one of our exhibits, which  
2 merely identifies the e-mail by control ID numbering, it's a  
3 Bates stamp basically, it's a scientific e-mail, of which a  
4 complaint has been received.

5 THE COURT: You are allowed to do that. You have  
6 an agreement with your customers that allows you, what, to  
7 unsubscribe?

8 MR. CAMERON: It does.

9 THE COURT: But if you only received, as I  
10 understand it, although I imagine the number is changing,  
11 about 6,000 complaints, and there were 120,000 e-mails  
12 linked to Adknowledge, then do you have the right to  
13 unsubscribe on behalf of those recipients who have not filed  
14 a complaint?

15 MR. CAMERON: We do, Your Honor, and I will -- if  
16 I may, let me describe that process a little bit and also  
17 provide some clarification for the Court.

18 With the additional 60 or 80,000 e-mails that we  
19 believe are out there, possibly more, there will be many  
20 more customer complaints. We simply just have not  
21 identified the customer complaints associated with those  
22 e-mails yet. So within the context of what we have on paper  
23 and what we've analyzed today, 64,000 e-mails and  
24 approximately 7,000 complaints, the Court must understand  
25 that these e-mails were not sent to 64,000 different e-mail

1 addresses. In fact, they were sent to I believe less than  
2 5,000 different e-mail addresses.

3           So what we have is a situation where we have  
4 complaints in number that exceed the number of recipients  
5 who are actually receiving these e-mails. It is possible,  
6 though without the data and without an in-depth analysis I  
7 can't state with any sort of conclusion, that the majority  
8 of recipients are complaining about these e-mails. However,  
9 be that as it may, it is not required under the law or under  
10 XMission's policies to receive a complaint from a customer  
11 in order to opt them out.

12           The way this process works and through the terms  
13 of service, every single customer of XMission agrees that  
14 XMission may take a proactive effort to unsubscribe and to  
15 combat spam. The purpose for that is recognized and  
16 inherent in the CAN-SPAM Act, which is that XMission is the  
17 one who carries the burden. XMission is the one who's  
18 paying the price for it. XMission is the one with standing,  
19 therefore XMission should be the one to say whether or not  
20 they want to receive them.

21           An individual customer's right is insignificant in  
22 comparison to the ISP's right when we're discussing e-mails  
23 of this volume.

24           THE COURT: As I understand from your papers, the  
25 unsubscribe or the -- the language is found in the message

1 and it doesn't work; am I right? Who's trying to  
2 unsubscribe, XMission or the consumer?

3 MR. CAMERON: It could be a combination of both.  
4 We don't necessarily have data on every unsubscribe link  
5 that an individual customer clicks. But what we do know is  
6 through the processes that they have established, every  
7 single one of those links is clicked when an e-mail arrives.  
8 When a message is identified as potentially being spam, it  
9 goes -- it's routed to a specific location or it passes  
10 through a system in the transmission process before it  
11 arrives to the customer's inbox wherein those unsubscribe  
12 links are clicked with the hope that the e-mails will stop  
13 of course.

14 Under 7704(a)(4), Adknowledge is required to stop  
15 those e-mails within ten days. The only thing that we're  
16 requesting with respect to this TRO is that Adknowledge  
17 follow the law, that they comply with the law. XMission has  
18 attempted to opt out. They've been unsuccessful. Within  
19 minutes of this hearing, I can provide to Adknowledge, to  
20 the extent they need it -- in their briefing they've said  
21 we've identified XMission's domains and we've confirmed our  
22 publisher has sent these e-mails -- we can provide them a  
23 list of all the domains that we want unsubscribed. The law  
24 requires them to have a process in place to suppress that  
25 and to stop the e-mails.



1 THE COURT: I'm sorry to interrupt you, but I'm  
2 just with my thought process. So you have identified the  
3 domains that you want them to stop, that you think that you  
4 have unsubscribed unsuccessfully?

5 MR. CAMERON: We have not identified them in the  
6 filings that we filed with the Court. The way they have  
7 been identified is through the process of clicking on the  
8 unsubscribe links, which presumably and under the law are  
9 supposed to transmit the data to Adknowledge, and within ten  
10 days they have to honor that.

11 THE COURT: And it hasn't worked?

12 MR. CAMERON: And it hasn't worked.

13 THE COURT: So from that procedure, you have been  
14 able to identify what that you can then give to Adknowledge?

15 MR. CAMERON: We've identified every single domain  
16 that XMission hosts that's receiving these e-mails. We can  
17 provide that in an Excel spreadsheet, which is the commonly  
18 accepted form for suppression lists, based off of our  
19 experience, we've been doing this for a long time, to  
20 Adknowledge, and they should and the law requires them to be  
21 able to suppress those.

22 THE COURT: When you say every single domain, are  
23 you then speaking of the third party, the publisher?

24 MR. CAMERON: No. The domains that I'm referring  
25 to are XMission's domains.

1 THE COURT: XMission's domains.

2 MR. CAMERON: Which might be at xmission.com, but  
3 they also provide customized domains for their customers.

4 THE COURT: You're going to have to walk me  
5 through that step.

6 MR. CAMERON: Before I get there, if I may, I  
7 would like to address a few more points regarding the  
8 procurement analysis.

9 THE COURT: Absolutely, but be sure and walk me  
10 through, because this is key, because you can probably tell  
11 that if I grant anything, I am going to tailor it as  
12 narrowly as possible. If I could -- and don't panic over  
13 here, I haven't heard you yet, Adknowledge -- I need to know  
14 how domain figures into this.

15 MR. CAMERON: So let me address two points. I've  
16 kind of gotten out of order. You know how that goes.

17 THE COURT: Yeah, I think out of order. So that's  
18 why you're where you are.

19 MR. CAMERON: I think we think in different  
20 orders. Maybe that's it.

21 I think I've stated this, but it's not in dispute  
22 that XMission has attempted to opt out. I think the record  
23 is clear on that.

24 This I think, Your Honor, is really the fulcrum  
25 point of their procurement argument, and there are actually

1 two. The first comes from a very telling and, in fact,  
2 troubling admission by Adknowledge, which is their  
3 contention that they have to shut down their entire business  
4 in order to stop e-mailing XMission.

5 Under the law, they are required -- absolutely and  
6 fundamentally required to be able to suppress within ten  
7 days. If, in fact, it is true that they have to shut down  
8 their entire business to stop e-mailing Adknowledge, their  
9 entire business exists in perpetual violation of the  
10 CAN-SPAM Act, willfully and knowingly. They are sending  
11 these e-mails, they are paying parties to send them, they  
12 are receiving unsub requests, and unless they shut down the  
13 entire business, they can't stop it.

14 However, the law requires it. They know the law  
15 requires it. They know, in going into this, in pushing the  
16 boulder down the mountain, that if somebody wants them to  
17 stop that boulder, they need to be able to stop it. Yet,  
18 they seek sympathy of this Court because it's standing atop  
19 of their mountain watching the destruction of the path of  
20 this boulder that they've put in motion, saying, Your Honor,  
21 we can't stop this. We can't be expected to stop this.  
22 This is somebody else's fault. It's nobody else's fault.

23 Adknowledge admits that it bridges the gap. It  
24 brings in the advertisers, it brings in the publishers, and  
25 it pushes this boulder down the mountain. And when it's

1 requested to unsub, which the law fundamentally requires, it  
2 has to shut down its entire business. This Court should be  
3 very concerned that the entirety of their business,  
4 specifically the e-mail marketing portion of it, exists in  
5 violation of the law.

6 To that point, Your Honor, they raise various  
7 arguments, really conclusory statements about their policing  
8 efforts, about their policies that are in place to make sure  
9 that their publishers comply with the law. In raising those  
10 policies, there are various contradictory statements, which  
11 I will address later. But I think important for this Court  
12 to note, and which is supported by the ASIS decision that we  
13 cited, which of course we recognize is not binding on this  
14 Court, but the Court must recognize that there are very few  
15 decisions binding on this Court, if any, with respect to the  
16 CAN-SPAM Act. So we take what we can find if we were  
17 creating law here.

18 But the Court need recognize that the very process  
19 that they have established through which their business  
20 operates is to incentivize publishers to get e-mails in  
21 those inboxes and induce parties to click the links, because  
22 if those links are not clicked, Adknowledge, by admission,  
23 is not paid. If the publishers don't get those links  
24 clicked, and these are the Adknowledge links in the e-mails,  
25 the publishers are not paid. They have created a situation

1 where these publishers have to get the e-mails in the  
2 inboxes. So the Court needs to understand the technological  
3 landscape of this.

4           We have in place with XMission a very  
5 sophisticated spam suppression and interference process.  
6 They subscribe to all of the latest RBL lists, all the  
7 latest blacklists. These are the lists that are constantly  
8 being generated identifying the domains from which spam is  
9 originating. They subscribe to SpamAssassin, which is  
10 pretty much at the helm and the lead of this fight with  
11 spam, all of which are designed to specifically identify  
12 criteria and e-mail, flag them as spam, and prevent them  
13 arriving at a customer's inbox.

14           So what do the publisher's have to do to get  
15 around that? They have to, through technological means,  
16 through sophisticated effort, develop ways to bypass those  
17 filters. In doing so, as demonstrated by the clear number  
18 of uncontested violations of the CAN-SPAM Act, they have to  
19 violate the law. If they don't falsify header information,  
20 those e-mails are going to be blocked by the spam filters.  
21 If they don't put in sender names that are intended to  
22 obfuscate, to confuse, to bypass filters that ultimately are  
23 misleading, generic or nonsensical, those e-mails are going  
24 to be blocked by spam filters. Yet they boast of 30- to  
25 40-percent higher click through rates than their

1 competitors. This is very telling.

2 Coupled with the admission that they can't stop  
3 the e-mails once they start them, otherwise they have to  
4 shut down their whole business, combined with the fact that  
5 this is incentivized click marketing, which fundamentally  
6 requires that those e-mails get into the inboxes, that they  
7 get opened and they get clicked, necessarily requires  
8 violations of the CAN-SPAM Act. If not, the filter is going  
9 to block them.

10 They have created a business that exists  
11 fundamentally on violations of the law. And while they may  
12 have paper contracts in place that passively state, you  
13 agree that you will comply with the law, they cannot rely on  
14 that as a pure defense. Procurement requires that they  
15 verify and confirm that they are not violating the law.

16 We have 65,000 e-mails. We've identified, if you  
17 combine the numbers, nearly 100,000 violations of the  
18 CAN-SPAM Act within those 65,000 e-mails. Those e-mails  
19 were intended to bypass filters, they were intended to get  
20 in inboxes, and they were intended to be clicked. And when  
21 we want them to stop, they have to shut down their whole  
22 business to do it.

23 This is the definition of procurement. This is  
24 exactly what the law was designed to prevent. This Court  
25 should not take sympathy on the company who pushes the

1 boulder down the mountain, especially where it's causing  
2 significant harm in its path.

3           With respect to the irreparable harm argument,  
4 Your Honor, unless there are additional questions on  
5 procurement, I hope I've explained it clearly and the Court  
6 understands our position. And I will reference briefly that  
7 there is some case law out there that we've cited that  
8 identifies even where there are contracts in place, such can  
9 be viewed as a paper tiger or a sham where the very nature  
10 of the business incentivizes violations of the law. We  
11 believe that's the exact situation we're operating within  
12 here. And it's even more telling, as I've discussed really  
13 ad nauseam at this point, that they can't stop the e-mails  
14 even if we ask them to. They have to shut down their entire  
15 business.

16           With respect to irreparable harm, I think the main  
17 point, Your Honor, that needs to be addressed is twofold.  
18 The first is it's true that the law requires harm to be  
19 attributable to e-mails that violate the CAN-SPAM Act. We  
20 identified four different types of violations of law which  
21 are not in dispute. They didn't even challenge the  
22 analysis. Every single one of these e-mails in question has  
23 at least one of those violations. And, though, we don't  
24 believe we're required to, if we needed to, Your Honor, we  
25 could identify 100, 200, 300, 500,000 additional e-mails

1 that XMission received from other parties that also are  
2 violating the Act in the same way. This is not an issue.  
3 This is a red herring.

4           The question is what is the irreparable harm that  
5 this Court has clued into. And, Your Honor, I apologize, I  
6 was slipping back into the adverse effect prong. But with  
7 respect to irreparable harm for purposes of a TRO, I  
8 believe, as we've cited in our brief, that the advisory  
9 notes or the legislative notes in the CAN-SPAM Act identify  
10 two or three types of harm that are, of their very nature,  
11 irreparable, that is delay of legitimate e-mails, that is  
12 interference, that is loss of efficiency of a legitimate  
13 Internet access service. That, coupled with the ongoing  
14 customer complaints, which I've explained to the Court the  
15 process, which are manually generated, require some sort of  
16 manual intervention by a customer, clearly demonstrates that  
17 the harm is ongoing.

18           This is a tight-knit community in the downtown  
19 Salt Lake City area. Although XMission offers Internet  
20 services in other areas, the majority of its business comes  
21 from this general area. One customer in a business where  
22 customer is king, one disgruntled customer who is out on the  
23 streets saying, I keep getting these e-mails, XMission is  
24 telling me they're unsubscribing, I keep getting them, they  
25 cannot offer what they have been promising to offer us for



1 20 years, that could have a catastrophic effect. And the  
2 law does not require us to actually show irreparable harm,  
3 simply a likelihood of it if this process doesn't stop.

4 What we have identified is nearly 7,000 customer  
5 complaints over the course of two months, that we have  
6 identified. The number could be significantly higher once  
7 we have an understanding of the full scope of the e-mails,  
8 the full volume of e-mails.

9 We have identified, in the last ten days prior to  
10 our filing the motion, that the e-mails continue to come in,  
11 the ones that we're identifying, that are easily identified  
12 because customers are complaining about them, and that we're  
13 getting customer complaints for nearly every single one. I  
14 printed off last night a report of the e-mails we've been  
15 able to identify up through March 3rd, and I can present  
16 that to the Court. I've got three copies. I can give one  
17 to opposing counsel.

18 THE COURT: March 3rd or May 3rd?

19 MR. CAMERON: May 3rd. Excuse me.

20 I believe it's the last one that will show that as  
21 the e-mails continue, the complaints continue. Of course I  
22 do need to identify for the Court that these aren't all the  
23 e-mails. These are just the ones that we've been able to  
24 scrape off the top. But what it does show is a pattern of  
25 continuing e-mails, a pattern of continuing customer

1 complaints.

2           And while I recognize, Your Honor, that the  
3 numbers identified in this are not significant, that's a  
4 function of our inability technologically and time-wise to  
5 identify and categorize all the e-mails. With more time,  
6 certainly these numbers will increase substantially. But  
7 what it shows is that for nearly every single e-mail,  
8 customers are complaining. We've tried to opt out. We've  
9 tried to unsubscribe. It hasn't happened.

10           The law recognizes that this type of harm,  
11 customer complaints, harm to reputation, the loss of  
12 goodwill is irreparable because it cannot be calculated to  
13 an exact sum. We've demonstrated with significant evidence  
14 and sufficient evidence that customers will continue to  
15 complain. The only possible conclusion is that that will  
16 irreparably harm XMission's reputation, it will harm their  
17 customers for which XMission, frankly, through its  
18 contracts, almost ends as a fiduciary for purposes of  
19 presenting this type of harm, that it will continue to  
20 experience delays of legitimate e-mail, that it will  
21 continue to expend money on a daily basis.

22           While we recognize that, yes, and we will concede,  
23 there are other e-mails that are coming in, Adknowledge is  
24 not the only offender, we have to start somewhere. The  
25 numbers for Adknowledge are significant. And obtaining a

1 TRO against a significant commercial marketer like  
2 Adknowledge will directly assist in the necessitation of  
3 XMission's reputation with its customers, because even those  
4 customers are continuing to receive the e-mails and  
5 continuing to complain about them, if XMission can represent  
6 we weren't getting what we wanted through technological  
7 means, we took the matter to the Court and the Court has  
8 prohibited them from sending more e-mails, we will be able  
9 to prevent the harm.

10 But without that we can't because the perception  
11 is that XMission advertises one thing, it cannot offer it,  
12 and despite the number of complaints and despite the  
13 unsubscription attempts, the e-mails keep coming. And one  
14 customer who starts to spread that information can have a  
15 catastrophic effect, let alone the number of customers it  
16 takes to comprise nearly 7,000 complaints. So I think based  
17 off of that, this Court can conclude that irreparable harm  
18 is imminent and certainly likely, which is the standard.

19 THE COURT: Let me just ask you, going back to my  
20 first -- or one of my questions, you said not so long ago,  
21 and you probably got it in -- you've got it in your papers  
22 and I think it's found in paragraph 68 of Mr. Ashdown's  
23 declaration, you've identified certain sender domains --

24 MR. CAMERON: Correct.

25 THE COURT: -- are these the domains that you

1 would ask me to tell Adknowledge to shut down, or how does  
2 it work?

3 MR. CAMERON: No. And help me understand that,  
4 Your Honor, because I understand the technology, it's new,  
5 it's changing every day and it can be confusing to  
6 understand where we're talking about domains on two  
7 different sides, so maybe I can paint a picture for the  
8 Court that will help the Court understand.

9 THE COURT: Tie it in, if you would, to the three  
10 parties, particularly the publisher that transmits, and et  
11 cetera.

12 MR. CAMERON: The domains that we've identified  
13 for purposes of our violations --

14 THE COURT: Is that in paragraph 68?

15 MR. CAMERON: Yes, although I don't have that in  
16 front of me. My memory --

17 THE COURT: I think it is.

18 MR. CAMERON: We have provided exhibits  
19 identifying all of those domains. Those are not XMission's  
20 domains. They are not recipient domains. Those domains are  
21 the domains used by the publishers to transmit the e-mails.

22 THE COURT: I figured that out.

23 MR. CAMERON: In order to transmit, there has to  
24 be a domain from which to transmit an e-mail, and that  
25 domain has an associated IP address. Of course, we've

1 identified 15,000 e-mails that were sent where the domain  
2 and the IP don't match, which is fundamentally false  
3 information in the header, and we've alleged that's a  
4 violation. That's not in dispute.

5 But the Court must understand that the sender  
6 domain is different from the domains that we're attempting  
7 to suppress. On the one side you have the advertiser, who  
8 doesn't have the technology to send their own e-mail  
9 advertisements. You have publishers who have registered an  
10 infinite number of generic, nonsensical domains with no  
11 other purposes other than to send spam e-mails, in most  
12 cases in violation of the very policies that they've signed  
13 and agreed to when they registered that domain, which we've  
14 identified as a violation of law and provided adequate  
15 summaries of evidence on that point.

16 With Adknowledge's help, Adknowledge brings  
17 together these publishers with the domains and the  
18 advertisers and they create the e-mails and they're sent  
19 out, and they're sent and transmitted from domains.

20 THE COURT: When you say those domains, the  
21 publishers' domains, and you're talking about 68?

22 MR. CAMERON: Yes. I don't have -- I have our  
23 exhibits. I can point out the exhibit if that would help,  
24 the specific exhibit that I'm referring to for the Court to  
25 clarify. I don't have the declaration in front of me. When

1 our staff put this together, it looks like they forgot to  
2 include that, so I apologize.

3           What we've identified is in Exhibit 25, we've  
4 submitted a document that looks like it's several hundred  
5 pages long, that identifies some key information. In the  
6 first line of each block, it identifies the domain  
7 registrar. The domain registrar is a third party and  
8 they're not related to this action. They're not  
9 responsible. They exist under the ICANN Convention  
10 internationally for the purpose of registering domains.  
11 They have certain compliance protocols to be a part of  
12 ICANN.

13           Through those domain registrars -- the common one  
14 that this Court is probably familiar with is GoDaddy.  
15 GoDaddy is a common domain registrar that most people have  
16 heard of, and that's because they advertise on TV.  
17 GoDaddy's role is to merely facilitate the registration of a  
18 domain that will exist online for whatever purpose.

19           The domain registrars maintain terms and  
20 conditions, terms of services and registration agreements,  
21 that in large part prohibit certain types of mass e-mail  
22 marketing. We've addressed that in our brief, and I don't  
23 need to go into detail on that.

24           A publisher will go to this domain and will  
25 register domain names from which to send these e-mail

1 addresses. So the second piece of information that we have  
2 on this exhibit under the large print header identifying the  
3 domain registrar is a domain name. And then under that you  
4 have numbers, a series of numbers. Those numbers identify  
5 individual e-mails. There are Bates stamp numbers for the  
6 e-mails.

7 So on page one of this document, it says 1&1  
8 Internet AG. That's the domain registrar. Below that is  
9 the sender domain that was registered with that registrar,  
10 which is familylivesafe.net. Then there were three e-mails  
11 transmitted with that --

12 THE COURT: Is there any way we can display that?  
13 Can you display that exhibit? We've got a very fancy --

14 MR. CAMERON: I've never used it, Your Honor, so I  
15 don't know how to do that.

16 THE COURT: I certainly don't.

17 Ms. Ford, do you?

18 THE CLERK: If you will pull that drawer out right  
19 under your --

20 MR. CAMERON: Right here?

21 THE CLERK: Yes. And then just put the document  
22 on the screen, it should come up.

23 There you go.

24 THE COURT: Are you seeing it? All right.

25 MR. CAMERON: So, Your Honor, the top left corner

1 identifies 62,861 messages. That's the total number of  
2 e-mails that we contend were sent in violation of various  
3 provisions of CAN-SPAM, and we've identified that in our  
4 brief.

5           Where you see 1&1 Internet AG, that identifies the  
6 domain registrar who maintains an anti-spam policy. Where  
7 you see familylivesafe.net, that identifies the actual  
8 sender domain that was registered through 1&1 Internet by a  
9 publisher and then transmitted e-mails for Adknowledge that  
10 included Adknowledge links and for which Adknowledge paid  
11 each time a link was clicked in their three e-mails, and  
12 these are the Bates numbers for those e-mails that fit that  
13 criteria.

14           If you move down to the next section, BigRock  
15 Solutions, Ltd, this is another domain registrar. They also  
16 have an anti-spam policy. The domain that was registered  
17 through BigRock is actualmove.net. Through actualmove.net,  
18 there were 2,126 messages transmitted. And if we skip ahead  
19 to page seven, there were seven pages of Bates numbers for  
20 those e-mails that will identify the next sender domain that  
21 was registered with BigRock, but only transmitted one  
22 message.

23           THE COURT: So can I summarize, and you tell me if  
24 I'm off? What you've put in 68 are the registrar sender  
25 domain and then there are several domain names that are



1 registered under each of these. What you would propose to  
2 give to Adknowledge would be such things as the family, et  
3 cetera, and have them stop there, or no?

4 MR. CAMERON: No. This is just the first part of  
5 the puzzle. So we're almost there. This shows us the  
6 domains from which the e-mails are sent. That's what it  
7 shows us. It directly relates -- this is all the evidence  
8 the Court would require to determine a violation of law.  
9 We've identified 60 plus thousand of those violations.

10 The e-mails are then sent and they are received by  
11 XMission's mail servers. In the individual e-mails, you  
12 have a from line, which is a name and a sender domain, and  
13 you have a recipient line, which identifies an e-mail  
14 address. If it were being sent to me, it would be  
15 jcameron@djplaw.com. The recipient domain is djplaw.com.

16 In this case, there are 65,000 plus e-mails, that  
17 we've obviously identified and analyzed, that were sent to a  
18 variety of sender domains, john@XMission.com -- recipient  
19 domains. Excuse me. John@XMission.

20 THE COURT: But you say there were only about  
21 5,000, am I right?

22 MR. CAMERON: There were only about 5,000  
23 individual e-mail recipients. There are even fewer  
24 recipient domains. We can identify every single one of  
25 those and provide those to Adknowledge so they have a list

1 of here are all of our domains and you put them on a  
2 suppression list, and the e-mails stop. That's the way this  
3 industry is intended to work. That's what the CAN-SPAM Act  
4 requires.

5 THE COURT: So the recipient domain names that you  
6 would provide are nothing without your giving a list  
7 Adknowledge says they have, but you would give them the list  
8 and you say they've unsubscribed, stop it?

9 MR. CAMERON: Right. And to make clear,  
10 Adknowledge and their publishers are sending the e-mails.  
11 They have all the e-mail addresses. They have all the  
12 domains. To facilitate the suppression of those, we will  
13 provide a list. However, we need the Court to recognize --  
14 and perhaps we can enter into an open stipulation that  
15 perhaps could make its way into the TRO -- that XMission's  
16 list is a trade secret. If this list gets out to its  
17 competitors, they will know XMission's customers. If it's  
18 shared by Adknowledge or sold, worst case scenario, to  
19 publishers, to other network marketers, it could result in a  
20 colossal influx in spam.

21 So to the extent we do provide the list, it needs  
22 to be subject to a protective order and only used for  
23 suppression purposes.

24 THE COURT: I understand what you're saying.

25 MR. CAMERON: So to answer this Court's question,

1 what we're really asking and we can tailor a TRO to be very  
2 limited in scope, which includes the identification from  
3 XMission of the domains we want suppressed and a requirement  
4 that Adknowledge suppress those. And it should, if we  
5 comply with the law, if we're set up the way the law  
6 intends, stop the e-mails. This absolutely does not require  
7 XMission to shut its entire business -- excuse me,  
8 Adknowledge to shut down its entire business. If it does,  
9 as I stated, they exist in perpetual violation of the law.  
10 The business should be shut down. But that would be the  
11 subject for a preliminary injunction instead of a TRO.

12 We can tailor a TRO to restrain them from sending  
13 an e-mail to those domains for ten days, or until we have an  
14 evidentiary hearing and a ruling on the preliminary  
15 injunction. And we can modify the order -- and I don't know  
16 that we've submitted our proposed order to the Court. We  
17 drafted it. I'm not sure if we got it filed last night.

18 MR. SCHMUTZ: If I may say, Your Honor, we did  
19 draft that. And then we received the pleadings last night  
20 and we failed to limit it appropriately. We needed to  
21 revise it. So we'll need to revise that and send it in.

22 MR. CAMERON: To that point, we believe that it  
23 could be and should be easily achievable. We're not asking  
24 for more than what the law already affords us. In fact, it  
25 should be noted that the law, and case law developed

1   thereunder, prohibits parties from requiring payment to  
2   unsubscribe or other mechanisms. Historically Adknowledge  
3   doesn't do this. We're not accusing them of this. There  
4   have been situations where in order to opt somebody out, you  
5   have to pay a fee.

6           To require a bond would almost impose a similar  
7   restriction on XMission. When all XMission wants to do is  
8   unsubscribe within its rights, it shouldn't be required to  
9   post a bond to do that. The law doesn't require it.

10           Your Honor, if I may, there are two or three other  
11   points I would like to address that I think are responsive  
12   to this Court's questions and I apologize if I've taken more  
13   time than --

14           THE COURT: No. This is important and I will  
15   certainly hear Adknowledge and everything they wish to tell  
16   me too.

17           MR. CAMERON: Of course.

18           There are various contradictions and  
19   inconsistencies that exist within Adknowledge's memorandum  
20   and their declarations which are material and which directly  
21   relate to particularly the procurement argument, but also to  
22   XMission's efforts to get these e-mails to stop.

23           Specifically, Adknowledge argues that it polices  
24   its network sufficiently to prevent violations of the law,  
25   but also admits that in order to stop the e-mails, it has to

1 shut down its entire business. I've discussed that.

2 Adknowledge claims that it received no notice from  
3 XMission, but admits -- does not contest that XMission has  
4 tried to unsubscribe from every single one of the e-mails.  
5 The law does not require notice. The law gives XMission and  
6 its recipients an option to unsubscribe, which option  
7 they've attempted to exercise. To state that XMission is  
8 somehow abusing the system and failed to give notice is  
9 simply inaccurate and also inconsistent with what  
10 Adknowledge has admitted.

11 Adknowledge claims in one part of its brief that  
12 it doesn't pay for e-mails, but then it admits that it  
13 actually does pay every time its links are clicked in the  
14 e-mails. There's no other way to get those links clicked  
15 unless the e-mails are sent. By incentivizing the clicks in  
16 the e-mails, Adknowledge is causing those e-mails to be sent  
17 whether the links are clicked or not.

18 Adknowledge claims that it verifies and confirms  
19 compliance with the law. This is important. This directly  
20 relates to procurement. But it admits, and this is a  
21 statement from both declarations, I believe, that it has no  
22 knowledge, right or control over the publisher's actions.  
23 How can it verify and confirm that its publishers comply  
24 with the law if in sworn statement it has no knowledge of  
25 what its publishers are doing? And it also says, we don't

1 even know if the publisher sends the e-mails or not. That's  
2 in the declaration of Mr. Hoggatt -- I'm not sure how to say  
3 it -- paragraph 19.

4 If, in fact, Adknowledge has no knowledge of what  
5 its publishers are doing, doesn't control it, and doesn't  
6 even know if the e-mails are being sent, how then can it  
7 verify and confirm that those e-mails are complying with the  
8 law? It can't. In other words, Adknowledge has no idea of  
9 what its publishers do, but every time one of the links is  
10 clicked in the e-mail, they make sure to pay a commission.  
11 That's the purpose of this business.

12 Adknowledge claims that it only sends to  
13 recipients who consented to receive the e-mails, but it  
14 admits that Adknowledge has attempted to opt out and it's  
15 still sending.

16 THE COURT: Say that again.

17 MR. CAMERON: Adknowledge claims that it only  
18 sends e-mails to recipients who have consented to receive  
19 them, but it does not contest the fact that XMission has  
20 attempted to unsubscribe from all of them when it continues  
21 to send e-mails. Clearly, consent is not given. And  
22 consent -- a firm consent, as defined under the law, is a  
23 separate analysis for a separate day, but it's worth  
24 pointing out, Your Honor, that Adknowledge attempts to rely  
25 on consent, consensual e-mails, solicited e-mails with a

1 very broad brush.

2           If this Court analyzes the statute, under Section  
3 7704(a)(5)(B), it specifically says to what extent  
4 affirmative consent plays a role within the context of the  
5 CAN-SPAM Act. And all it says is that where a party gives  
6 affirmative consent, violations of Section 7704(a)(5) are  
7 not actionable. We do not allege any violations of  
8 7704(a)(5). So to the extent the parties did give  
9 affirmative consent is irrelevant where we're not alleging  
10 violations of the specific provision to which a firm consent  
11 applies.

12           A firm consent also applies to sexually explicit  
13 messages. We haven't alleged any sexually explicit messages  
14 here, and the argument is irrelevant.

15           Adknowledge claims that it reacts promptly to  
16 opt-out requests, yet argues that in order to stop  
17 XMission's e-mails, it has to shut down its entire business.  
18 Adknowledge claims that the publishers control and maintain  
19 relationship with the recipients, but then states that it  
20 has a database of 600 million people to which it directs  
21 messages and it also has the ability to target -- and target  
22 is the operative word here -- two billion people in 50  
23 different countries. If, in fact, the publishers control  
24 all of that, how does then Adknowledge have a database of  
25 600 million and the ability to target on its own two billion

1 people?

2 THE COURT: Let me back up one sec. Adknowledge  
3 says that it reacts promptly to opt-out requests. And you  
4 say that the way that you were able to find out that  
5 Adknowledge was involved with certain of these e-mails is  
6 because the unsubscribe link went back to Adknowledge,  
7 right?

8 MR. CAMERON: Let me clarify that point, Your  
9 Honor. I appreciate the question. If I may direct this  
10 Court's attention to another exhibit, this will help to  
11 clarify.

12 This is Exhibit 1 to the declaration of  
13 Mr. Ashdown. This is what we've designated as sample  
14 redirect report.

15 Technical difficulties. I apologize.

16 THE COURT: Don't blame you a bit.

17 MR. CAMERON: What we have identified in this  
18 summary of evidence is the e-mail identified by control ID  
19 number, the time and date that it was received, and the link  
20 that was in the e-mail itself that identifies Adknowledge.  
21 If you go through, you can see all of these. In some  
22 e-mails, there are a whole slew of links that identify  
23 Adknowledge. In others, they are more limited.

24 This is what we call a terse report. This only is  
25 showing us a small piece of the actual report. The purpose



1 for that is we submitted ten pages. The full terse report  
2 is 9,000 pages long.

3 THE COURT: How do you spell that word?

4 MR. CAMERON: I call it t-e-r-s-e.

5 THE COURT: Like terse?

6 MR. CAMERON: I don't know where that came from.  
7 Somehow this got designated along the way. That's what we  
8 call it.

9 The complete report, if we were to include and  
10 demonstrate to the Court, which we have the data to provide,  
11 all of the unsubscribe links as well, would encompass -- I  
12 mean we're talking 65,000 e-mails, multiple links and  
13 e-mails, this could be 65,000 pages long. We've had reports  
14 that are hundreds of thousands of pages long.

15 THE COURT: Okay. So just, shorthand, simplify.  
16 If I get a spam message that supposedly or must have, under  
17 law, some way for me to unsubscribe, what's it going to look  
18 like, the link where I'm --

19 MR. CAMERON: It can look like a variety of  
20 things. It can say if you wish to opt out, click here, and  
21 you just click. If you wish to unsubscribe, you click the  
22 unsubscribe button. There's no specific requirement under  
23 the law of how it's supposed to look.

24 What the law requires is that it is clearly and  
25 conspicuously displayed and that it remains active for 30

1 days.

2 THE COURT: And that link, the unsubscribe link,  
3 whatever it might look like, how does that relate to those  
4 terse messages you're showing me?

5 MR. CAMERON: That does not directly relate to  
6 what I'm showing you on the screen. What I'm showing you on  
7 the screen is simply an exemplary sample of what the links  
8 look like when they are expanded that exist in the e-mails.

9 THE COURT: So when you say expanded, what do you  
10 do?

11 MR. CAMERON: When you receive an e-mail, you get  
12 a picture, and you click the picture and it takes you to the  
13 Web site. You don't see what's behind it. You don't see  
14 essentially the guy that's directing traffic, telling it  
15 where to go. When you click that link, you then record  
16 what's called a redirect link. And what it does is upon  
17 click, all of the information that is entered automatically  
18 is recorded in a successive link until that e-mail arrives  
19 at its destination, and then it stops.

20 THE COURT: So are you telling me that for each  
21 simple redirect link that a user might get, if she or he  
22 clicks on it, ultimately the behind-the-scenes data will  
23 look like these?

24 MR. CAMERON: Exactly.

25 THE COURT: So it will link to Adknowledge?

1           MR. CAMERON: It will click through Adknowledge  
2 and it will arrive at the advertiser's Web page, or the  
3 destined Web page.

4           There are other various important pieces of  
5 information here that perhaps I should point out to the  
6 Court.

7           THE COURT: It travels through --

8           MR. CAMERON: It travels through, and as it --

9           THE COURT: It travels through Adknowledge?

10          MR. CAMERON: Right. As admitted in their  
11 briefing, they do this so they can track every click because  
12 if they don't, they don't get paid and they don't know how  
13 to pay their publishers. So it has to route through  
14 Adknowledge for them to have knowledge that these are their  
15 e-mails that are successful that are being clicked.

16          THE COURT: Let me just stop you there. What  
17 travels through Adknowledge when every time a potential  
18 consumer clicks onto the spam in her or his mailbox or when  
19 the consumer says unsubscribe?

20          MR. CAMERON: With respect to the unsubscribe,  
21 they can provide more information on that, and I can address  
22 it based off of my knowledge of the industry. But let me  
23 explain what we're seeing here.

24          THE COURT: This has to be behind every e-mail so  
25 that you say Adknowledge can keep score of what it's owed

1 and what it needs to pay the publisher because it's paid  
2 when there's a click on and it pays the publisher?

3 MR. CAMERON: Exactly. So you don't see any of  
4 this. And if this doesn't exist, than you click on the link  
5 and it goes nowhere, nothing happens. We've all had that  
6 happen where you get an e-mail and it's old and it says  
7 click this link and you click and it doesn't go anywhere.  
8 That's because this link has been terminated. It no longer  
9 exists.

10 There are situations where you can click on a link  
11 and it goes directly to an advertiser's Web site and it  
12 doesn't identify Adknowledge, it doesn't identify a  
13 publisher, it doesn't identify a marketer. In that case,  
14 we're not talking about those e-mails. The only e-mails  
15 we're dealing with here are the ones that identify  
16 Adknowledge and, by Adknowledge's own admission, they use to  
17 track their progress and to get paid.

18 There's another piece of information that's  
19 important here, and I believe that the number that you see  
20 after you see [adknowledge.com/preferences.php](http://adknowledge.com/preferences.php), these  
21 actually might be an unsubscribe link based off of the  
22 preferences knowledge, but I can't conclusively state that.  
23 But what you have, 2092318, these are typically in the  
24 business of what we call affiliated IDs. This is how  
25 Adknowledge knows which one of its publishers sent the

1 e-mail. Of course 20923180 means nothing to us. With this  
2 data, we cannot identify a publisher. Adknowledge can.

3 With the redirect links that we can provide, every  
4 single one of them, Adknowledge has the ability to identify  
5 every single one of the publishers who's responsible for  
6 that e-mail.

7 THE COURT: So let me just make sure that I  
8 understand. You're saying it really goes back to the way  
9 that Adknowledge is paid and pays. It has to know -- it has  
10 to know the publisher -- it has to know the publisher so it  
11 can pay the publisher?

12 MR. CAMERON: Right, and so it can get paid  
13 itself.

14 THE COURT: So it has to know which publishers.  
15 And you're saying that all the affiliated Adknowledge spams,  
16 you have tried to unsubscribe unsuccessfully?

17 MR. CAMERON: Let me clarify the record because I  
18 don't want to be accused of misleading the Court. There are  
19 circumstances where unsubscribe links may have been honored,  
20 but certainly there are circumstances where they have not  
21 because the e-mails continue.

22 THE COURT: Is it fair to say, then, that what you  
23 want is Adknowledge to stop sending all the publishers'  
24 e-mails that go through XMission here in Utah? Is that sort  
25 of what you're asking me?

1 MR. CAMERON: Yes. So let me clarify one point.  
2 The publishers are the ones that are clicking the send  
3 button. What we want Adknowledge to do and what they are  
4 obligated to do under the law, under Section 7704(a)(4), is  
5 to for themselves suppress the lists. And in order to do  
6 that, they have to tell their -- they publish their  
7 suppression list to their publishers. So their publishers  
8 are given a directive and they are required -- I don't know  
9 how Adknowledge does it, but this is what is common in the  
10 industry and the way it's supposed to work. They are  
11 required to maintain suppression lists and their publishers  
12 are required to maintain those suppression lists so that the  
13 e-mails will stop.

14 THE COURT: So we're talking about a suppression  
15 list, and that suppression list, you have it?

16 MR. CAMERON: The suppression list is  
17 Adknowledge's. What we have are the recipient domains that  
18 we can give them to put on their master suppression list,  
19 which is supposed to stop the e-mails.

20 THE COURT: But they don't have a suppression list  
21 that now includes the e-mails that you say XMission is  
22 trying to suppress because it hasn't gone through, or what  
23 are you saying?

24 MR. CAMERON: I don't know if they have them or  
25 not. I believe they state in their brief that they do at

1 least have some of them. What we're willing to do to  
2 facilitate the suppression is provide the complete list.

3 THE COURT: A suppression list?

4 MR. CAMERON: A list of our domains that they can  
5 include on their suppression list.

6 THE COURT: That they may include?

7 MR. CAMERON: Yes, and that they are required to  
8 publish to their affiliates to stop the e-mails.

9 THE COURT: All right. I understand that. Go  
10 ahead, please.

11 MR. CAMERON: I have one other point, Your Honor,  
12 and this was just another inconsistency that relates to the  
13 procurement argument. In declaration, Adknowledge claimed  
14 that it only uses a few select, highly qualified publishers.  
15 However, two paragraphs prior to making that statement,  
16 Adknowledge admits that it has relationships with  
17 innumerable publishers. It begs the question, innumerable  
18 means without number, meaning so many publishers you don't  
19 even know how many there are. Yet two paragraphs later,  
20 they say we only select a few highly qualified publishers.

21 I will remind the Court, they have admitted, we  
22 have no knowledge or control over what our publishers do.  
23 We don't even know if they send e-mails. This is a complete  
24 loss of institutional control, to borrow from the common  
25 NCAA vernacular. This is a situation where there is no

1 attempt, outside of a paper sham, to verify and confirm that  
2 these publishers are complying with the law because they  
3 can't do it, they don't even know who they are, they're  
4 innumerable, they don't have control over it, they don't  
5 have knowledge of what goes on. They simply pay when the  
6 links are clicked. And that business induces violations of  
7 the law. They are responsible for that as the procurer.

8 They stood on the mountain, they pushed the  
9 boulder down, they are watching it fall. And now when they  
10 are requested to stop it, they want sympathy of the Court  
11 because if they stand in front of that boulder, they are  
12 going to get squashed. The Court should not have sympathy  
13 on them, Your Honor.

14 THE COURT: Thank you.

15 Let's take about a five- or ten-minute break and  
16 then hear from you, counsel.

17 (Recess)

18 THE COURT: Ready to go, Mr. Newman?

19 MR. NEWMAN: Good morning, Your Honor. May it  
20 please the Court, my name is Derek Newman. I represent  
21 Adknowledge, Inc.

22 XMission's statement of the facts in this case are  
23 largely incorrect. They are not supported by any evidence  
24 and the reason why is because they're just false. I think  
25 there are only two statements of fact that were true. The



1 first is Adknowledge didn't send any e-mails. The  
2 publishers sent the e-mails. The second, which is true, is  
3 Adknowledge tracks commissions for advertisers and so a link  
4 Adknowledge has appears in the e-mails. Those are the only  
5 two facts --

6 THE COURT: Do you also pay publishers?

7 MR. NEWMAN: Yes, Your Honor.

8 THE COURT: So you are paid by advertisers for  
9 every click?

10 MR. NEWMAN: Yes, Your Honor.

11 THE COURT: And then you pay publishers for every  
12 click, right?

13 MR. NEWMAN: Yes, Your Honor, except the  
14 publishers send the e-mail regardless of whether Adknowledge  
15 places a link in the e-mail.

16 These publishers all have prior preexisting  
17 relationships with their customers. They regularly send  
18 their customers e-mail. Adknowledge may place a link and  
19 then is entitled to a commission if there's a click, pays  
20 the advertiser, but if Adknowledge does not place the link,  
21 the e-mail is still sent.

22 THE COURT: Let me just ask you, then, but you are  
23 paid by the advertiser for each click, you told me, and then  
24 you pay the publisher for each click?

25 MR. NEWMAN: Yes, Your Honor.

1 THE COURT: If the publisher and the advertiser  
2 have the relationship and the publisher can send the e-mail  
3 and needs nothing from you, why are you even in the chain?

4 MR. NEWMAN: Because Adknowledge has  
5 relationships.

6 THE COURT: With?

7 MR. NEWMAN: With advertisers. In fact, half of  
8 the Fortune 500, Volkswagen, L'Oreal, amazon.com, Land  
9 Rover. Substantial relationships with advertisers, and with  
10 publishers. And these publishers aren't just e-mail  
11 publishers. They publish on YouTube, a video channel.

12 THE COURT: Let me stop you. So from your first  
13 statement I sort of gather, but I guess that's wrong, that  
14 you're not needed, that even if you weren't in the chain,  
15 the publishers and the advertisers could make the  
16 arrangement to send the e-mail to the user through XMission  
17 without you? But your role is, from what you tell me, which  
18 is the truer, that you have the existing -- that you have  
19 the relationship with the advertisers and the publishers or  
20 you're really not needed?

21 MR. NEWMAN: Adknowledge has a relationship with  
22 the advertiser and the publisher. Your Honor asked whether  
23 the publisher and the advertiser could get together without  
24 Adknowledge. The answer is yes, but the publisher probably  
25 doesn't know the advertiser and because Volkswagen doesn't

1 do business with just anybody. And the publisher, the Court  
2 should note, sends the e-mail regardless. And I'll give the  
3 Court an example of the type of e-mail it sends.

4 THE COURT: Regardless of what?

5 MR. NEWMAN: For example, a publisher may be an  
6 electronics retailer like BestBuy. And the consumer has  
7 requested that BestBuy send it regular updates about  
8 products that are on sale and the like. BestBuy can also  
9 include advertisements in the e-mail it already sends on  
10 behalf of others. BestBuy may have a direct relationship  
11 with an advertiser and it will do that deal directly or it  
12 may use Adknowledge's services where Adknowledge connects  
13 the advertiser with the publisher and the advertisement is  
14 placed. Adknowledge doesn't send the e-mail and if  
15 Adknowledge were to terminate its business, the e-mails  
16 would still be sent.

17 THE COURT: Wait. Wait. Wait. The e-mails would  
18 be sent by the publisher?

19 MR. NEWMAN: Yes, Your Honor, because the  
20 publisher already has relationships with consumers and it  
21 sends these consumers e-mails. And Adknowledge, through a  
22 substantial vetting process to make sure publishers are  
23 reputable and complying with laws, enters into relationships  
24 with publishers to provide the opportunity to run  
25 advertisements for these big companies that do deals with

1 Adknowledge.

2 THE COURT: But how do you keep track of when an  
3 advertiser owes you for a click and when you must then pay a  
4 publisher?

5 MR. NEWMAN: Adknowledge provides the publisher  
6 the link which was displayed in the exhibit that XMission  
7 displayed. And that's one of many links. It's not the only  
8 link. There's other links to other products. In the  
9 BestBuy example, it might be to BestBuy, it might be to  
10 another advertiser, or it might be to an advertiser that  
11 Adknowledge has referred. Adknowledge provides the link to  
12 the publisher. The user says, oh, I'm interested in that  
13 product, clicks on the link, and that sends a message to  
14 Adknowledge that there's been a click. So it records the  
15 click. After the click is made, the user is directed to the  
16 advertiser's Web site.

17 So, for example, GEICO, the large insurance  
18 company, is one of Adknowledge's advertisers and GEICO will  
19 enter into an agreement with Adknowledge to find  
20 impressions, meaning consumers' views.

21 THE COURT: Say that word again.

22 MR. NEWMAN: The word is impression. It's an  
23 advertising term.

24 So every time a consumer sees something that is of  
25 marketing or advertising value, advertisers call that an

1 impression. When ads are placed, they're usually for  
2 impressions. You pay for consumer impressions.

3           So GEICO wants more impressions because it wants  
4 to sell more insurance and it advertises on TV. The Court  
5 has probably seen GIECO's ads. It's a large advertiser with  
6 Adknowledge. So Adknowledge will place a GEICO ad with a  
7 publisher. What that is is the link that XMission  
8 displayed. It will go in an e-mail that is going to be sent  
9 in any event. They might have other ads. Usually, almost  
10 always has other ads. It's not just limited to this one  
11 advertisement that Adknowledge places. And to the extent  
12 that ad is placed, the consumer clicks on the link,  
13 Adknowledge can track it because it sends a message to  
14 Adknowledge saying click, and then GEICO receives an  
15 impression, user traffic.

16           THE COURT: For each click, Adknowledge is paid  
17 and then the publisher is paid?

18           MR. NEWMAN: Yes, Your Honor. GEICO pays  
19 Adknowledge, Adknowledge retains a fee and pays the balance  
20 to the publisher.

21           THE COURT: So when you say you have no control  
22 over the publisher, you must have some kind of control  
23 because if they're doing something illegal, you don't have  
24 to pay them?

25           MR. NEWMAN: Yes, Your Honor.

1           May I take a step back?

2           THE COURT: Please step back.

3           MR. NEWMAN: Thank you.

4           I would like to tell you about Adknowledge's  
5 business just a little bit, and it's in our memorandum and  
6 in the supporting declarations, and I hope the Court will  
7 have the opportunity to read them.

8           THE COURT: The Court has read them, but the Court  
9 needs help.

10          MR. NEWMAN: Thank you. I would love the  
11 opportunity to provide that help.

12          THE COURT: That's why we're here.

13          MR. NEWMAN: Adknowledge is a large company. It  
14 is fourth in the world behind three other ad networks,  
15 Google, Yahoo, Microsoft, and then comes Adknowledge.  
16 Adknowledge connects advertisers with publishers.  
17 Publishers are not limited to e-mail marketers. They might  
18 be mobile games that you play on your phone. They might be  
19 a video channel on YouTube. It might be a blog. It might  
20 be a Web site. Adknowledge has these relationships, lots of  
21 relationships.

22          So Google, for example, has the eyes of ten  
23 billion consumers, or the like. Adknowledge has the eyes of  
24 two billion consumers. XMission cited that. That's not  
25 e-mail marketing. That's its entire network that it has

1 built.

2 One type of marketing that it does and it's very  
3 good at is connecting advertisers with e-mail publishers.  
4 The reason it's so good at that is Adknowledge has robust  
5 terms and conditions, practices and policies, and  
6 agreements. It requires every publisher to agree to certain  
7 things.

8 THE COURT: Let's just stop right there. I have  
9 no doubt but that you do impose certain rules upon your  
10 publishers and many of those rules are written in light of  
11 the law. And one of the laws -- provisions of the law is  
12 that when an e-mail recipient or someone authorized to act  
13 on behalf of the recipient says unsubscribe, I don't want to  
14 see any more, it will happen, right?

15 MR. NEWMAN: Yes, Your Honor.

16 THE COURT: But it isn't?

17 MR. NEWMAN: That's not true. In fact, XMission  
18 said that Adknowledge admitted it received unsubscribe  
19 requests. That's just false. And XMission said that  
20 unsubscribe links didn't work. That's false too. We tested  
21 them.

22 THE COURT: How do you know that?

23 MR. NEWMAN: Because XMission provided in its  
24 papers some of these links and Adknowledge tested them and  
25 they were successful.

1           Now the unsubscribe links, Your Honor, aren't  
2 Adknowledge's unsubscribe links. So to the extent that the  
3 unsubscribes were made to Adknowledge, that wouldn't stop  
4 the publisher from sending e-mails. They're the publisher's  
5 unsubscribe links.

6           THE COURT: Stop just there. Do you receive any  
7 notification of an unsubscribe request?

8           MR. NEWMAN: Your Honor, there are two types of  
9 unsubscribes with respect to Adknowledge's services. One,  
10 Adknowledge doesn't control. That's the publisher's  
11 unsubscribe link. That's the link that appears in the  
12 e-mail. To the extent that XMission is clicking on links,  
13 it doesn't flow through Adknowledge. Adknowledge doesn't  
14 control it.

15           But Adknowledge, as I said, has rigorous  
16 practices, policies and procedures, and it maintains a  
17 suppression list that XMission discussed. And it deploys  
18 that suppression list to every one of its publishers and  
19 what that does is it doesn't stop e-mails, because  
20 Adknowledge can't do that, it doesn't send the e-mails, but  
21 it stops the publishers from sending any Adknowledge  
22 advertisements to anyone on the list. So XMission still  
23 receives the spam. It just won't have Adknowledge's link.

24           And, Your Honor --

25           THE COURT: Let me just stop you here.



1 Adknowledge says it has attempted to unsubscribe. However,  
2 those e-mails continue to come.

3 MR. NEWMAN: That's false.

4 THE COURT: That's totally false?

5 MR. NEWMAN: Totally false. Totally false.

6 THE COURT: See, I have trouble when you say that  
7 because I think there might be a misunderstanding. But I  
8 cannot accept that an attorney gets up here and tells me it  
9 doesn't work.

10 MR. NEWMAN: I never said that.

11 THE COURT: Then what did you mean by that is  
12 false?

13 MR. NEWMAN: Your Honor, Adknowledge has not  
14 received unsubscribes that were unsuccessful. That never  
15 happened. Every unsubscribe that Adknowledge receives  
16 through its system is successful. To the extent that it's  
17 not, it's promptly reported and Adknowledge takes swift  
18 action against the publisher by finding it, putting it into  
19 compliance if there's a technical issue, for example, or  
20 terminating it.

21 THE COURT: How do you explain -- because I don't  
22 think XMission has gone to this trouble and has its attorney  
23 up here to tell me that they can't unsubscribe if that isn't  
24 happening. What is your explanation for what's happening?

25 MR. NEWMAN: Why is XMission here today?

1 THE COURT: Well, why when they say, when I am  
2 told we have attempted to unsubscribe and it is  
3 unsuccessful, what is happening?

4 MR. NEWMAN: I think that the statistics that  
5 XMission submits provide some light on it.

6 THE COURT: Tell me, then.

7 MR. NEWMAN: XMission shows that in January, for  
8 example, it received 100,000 or so e-mails and only 16  
9 complaints. And over the months following January, the  
10 e-mails decreased and the complaints increased. It seems  
11 like a systematic scheme that XMission has developed.

12 THE COURT: Wait. Wait. Wait. Wait. Wait.  
13 What are you telling me, that when I am told by Mr. Cameron  
14 that they have received 6,000 complaints, that is untrue?

15 MR. NEWMAN: I think the complaints might be  
16 automated. But, Your Honor, Adknowledge never received any  
17 complaints. XMission --

18 THE COURT: No, they wouldn't.

19 MR. NEWMAN: Well, they should have.

20 THE COURT: Why?

21 MR. NEWMAN: Because in January, according to the  
22 papers that XMission filed, it surreptitiously started  
23 collecting e-mails without making a complaint to anyone.  
24 When it saw the Adknowledge link in January, it could have  
25 called up Adknowledge and provided these domain names it was

1 talking about and said to add it to your suppression list.  
2 What would have happened is the e-mails would not have  
3 stopped flowing because the publishers still send them, but  
4 they would not have had Adknowledge's links in them.

5 THE COURT: Let me just ask you, though, if you  
6 received the list --

7 MR. NEWMAN: Which list?

8 THE COURT: -- that Mr. Cameron proposes giving  
9 you -- is it the domain names?

10 MR. CAMERON: Yes. The recipient domain name  
11 list.

12 MR. NEWMAN: I understand that, Your Honor.

13 THE COURT: If you received these recipient domain  
14 lists and I were to say you tell -- and those are linked to  
15 publishers; am I correct, counsel?

16 MR. NEWMAN: No, Your Honor.

17 THE COURT: To whom are they linked?

18 MR. NEWMAN: The domain names are linked to  
19 XMission's customers.

20 THE COURT: Right, but --

21 MR. CAMERON: Your Honor, if I may clarify?

22 THE COURT: Sure. Please do.

23 MR. CAMERON: The domain names are XMission's,  
24 XMission's customer link. I believe what you're referring  
25 to is the suppression list which is published to the

1 affiliate publishers. If I'm understanding the Court  
2 correctly, the question is if we provide our domain list,  
3 does he have the ability to put it on their suppression list  
4 and publish it to their publishers?

5 THE COURT: Yes, and that's better phrased. Could  
6 you do so?

7 MR. NEWMAN: Yes. But Your Honor didn't ask about  
8 the effect of that. The effect of that would not be  
9 stopping any e-mails. The effect would mean that  
10 Adknowledge's ads don't appear in the e-mails. XMission  
11 would still receive the e-mails.

12 THE COURT: XMission's ads would not appear in the  
13 e-mails? In other words, you wouldn't get paid for those  
14 e-mails?

15 MR. NEWMAN: Well, Adknowledge is never paid for  
16 e-mails. Adknowledge is paid for impressions.

17 THE COURT: So would you still get paid?

18 MR. NEWMAN: No, because the ad wouldn't appear.

19 THE COURT: You wouldn't get paid and you wouldn't  
20 pay?

21 MR. NEWMAN: Gladly, because Adknowledge has a  
22 robust suppression list and a compliance department with  
23 full-time employees to ensure no violations. To the extent  
24 that anyone complains ever, that's added to the suppression  
25 list and it's deployed to the publishers.

1 THE COURT: Well, then, what's the harm to you to  
2 provide under a suitable protective order the domain list,  
3 tell your publishers none of our ads go to those domain  
4 lists, you won't be paid for them, and what would be the  
5 problem with that? How would you be harmed?

6 MR. NEWMAN: Well, I can see two points of harm.

7 THE COURT: Okay. Tell me.

8 MR. NEWMAN: The first point, which is much more  
9 important than the second, is if a TRO issues against  
10 Adknowledge, because of its size, it's going to get sued  
11 every day by plaintiffs that want to collect \$250 per  
12 e-mail, just as XMission does. That type of stain on its  
13 record means that advertisers aren't going to advertise with  
14 it and publishers aren't going to accept its ads. The TRO  
15 impact to Adknowledge's business is substantial.

16 THE COURT: Then let me ask you this, and I  
17 understand that. What is the problem with a stipulated  
18 agreement?

19 MR. NEWMAN: None. Your Honor, if they would have  
20 provided this list, Adknowledge would have added it to the  
21 suppression list, and I don't know what their argument would  
22 be today. I think they would still be here. I believe it's  
23 for a strategic purpose.

24 THE COURT: Why don't we try that to see if there  
25 is a stipulation and a protective order until we get this in

1 a place where we can have a full evidentiary hearing.  
2 Adknowledge then avoids what you call the taint, I think, of  
3 a TRO, and XMission receives relief.

4 MR. NEWMAN: It doesn't really receive relief  
5 because it's going to receive e-mails. They're just not  
6 going to have Adknowledge links on them.

7 THE COURT: How would you feel about that?

8 MR. CAMERON: Your Honor, I think we could  
9 probably reach a stipulation. We would prefer to submit it  
10 in the form of a stipulated TRO that requires them --

11 THE COURT: Except if I said -- you know, nobody  
12 likes to be enjoined and I, frankly, don't like to enjoin,  
13 although I certainly will unless I have all the evidence in  
14 front of me. What's the problem with this list being with  
15 very rigorous protections for both sides, I give Adknowledge  
16 the protection and you avoid a TRO? It just shows what a  
17 good company you are by entering into a stipulation, and you  
18 won't disclose, and you can understand the harm that could  
19 flow to XMission. XMission, you get all the relief you want  
20 and we avoid a TRO, and you get them stopping. They say  
21 you're still going to get the e-mails, we just won't have  
22 our advertisers in them. How would you feel about that?

23 MR. CAMERON: There are two points, Your Honor,  
24 and I will have an opportunity to rebut. I believe there  
25 are various inconsistent statements that have been made and

1 would provide some clarification if those statements were  
2 clarified.

3 To the Court's point, though, we would not be  
4 resistant to a stipulated order. We do argue that it has to  
5 be an order of the Court. The reason for that is --

6 THE COURT: I would order that this stipulation --  
7 pursuant to the stipulation, this is my order, but it's not  
8 a TRO.

9 MR. CAMERON: But to the extent it enters as an  
10 order of this Court, then we believe that we have available  
11 recourse if it is violated.

12 THE COURT: True.

13 MR. CAMERON: If it's simply a stipulation between  
14 parties, Mr. Newman has been up here telling you all the  
15 reasons why they can't stop the e-mail. If that's true and  
16 we simply reach an agreement, then all we have is a breach  
17 of contract claim and we have to initiate another lawsuit  
18 and we have to go through this process all over again.

19 THE COURT: Well, no, you have a contempt --

20 MR. CAMERON: Well, if it's an order of the Court  
21 is what I'm saying, which is why it must be an order of the  
22 Court.

23 MR. NEWMAN: Your Honor, had XMission contacted  
24 Adknowledge and asked for these domain names to be added to  
25 the suppression list, Adknowledge would have done that.

1 XMission would still be here, it would have a different  
2 argument because I don't believe that its motives here are  
3 in good faith. And I also anticipate that if an order  
4 issues, they're going to seek contempt if they receive  
5 something, even though Adknowledge is going to fully comply,  
6 as it would even if there wasn't an order, to add the domain  
7 names to its suppression list.

8           The reality is is this TRO was brought in bad  
9 faith. XMission never contacted Adknowledge --

10           THE COURT: You know what, Mr. Newman, I really  
11 don't like to hear those sorts of claims. I've been doing  
12 this 20 years and it's very rarely that I run into bad faith  
13 things.

14           MR. NEWMAN: XMission didn't even serve its  
15 complaint when it filed the lawsuit weeks ago.

16           THE COURT: They had some problems here. But  
17 rather than making these claims of bad faith -- maybe I'm  
18 just naive, maybe my 20 years here, 14 years as a prosecutor  
19 still left me unbelievably naive, but what I'm going to do  
20 is -- do you think, given all the language that's been  
21 discussed and bandied about here, do you think, Mr. Cameron,  
22 that you and Mr. Newman, and perhaps Ms. English, and you,  
23 Mr. Schmutz, do you think you can sit down and craft an  
24 order that would give them the relief, you the relief that  
25 would be for my signature and would avoid the taint of a



1 TRO, and then we could set this down for an evidentiary  
2 hearing? How do you feel about that, Mr. Cameron?

3 MR. CAMERON: Your Honor, we're certainly willing  
4 to try.

5 THE COURT: How about you, Mr. Newman?

6 MR. NEWMAN: Your Honor, I'm concerned about the  
7 idea that there's contempt sanctions. Adknowledge is  
8 suspicious of XMission, even though the Court is not, and  
9 that's fair. And I have experience with my colleagues who  
10 represent XMission and I think they are fantastic lawyers.  
11 I like them and I'm looking forward to working with them in  
12 this case.

13 The reality is is they never contacted  
14 Adknowledge. They do not have a likelihood of success on  
15 the merits. Adknowledge has rigorous policies in place that  
16 they police.

17 THE COURT: Then let me tell you this. From what  
18 I've heard, there seems to be, whether you have your  
19 rigorous policies in place or not, something slipping  
20 through. And it might be that you've got some rogue  
21 publishers or something that's not working, et cetera. I  
22 don't know. But when I get these sorts of declarations --  
23 and I have read your declarations as well, and I know you  
24 have these policies -- I have to believe that some spam is  
25 slipping through. I want to stop it. I want to stop it

1 permanently if it's in violation of the Act. But I truly  
2 won't know fully until I have a full evidentiary hearing.

3 Now I know you worry about contempt, but it is not  
4 easy to prove contempt. And before I would impose contempt  
5 sanctions, which I've done very little of in my life, we  
6 would have to have what is clear and convincing, and all  
7 that sort of stuff. Do you want to try and work this out  
8 with XMission's attorneys or do I just hear you on the  
9 merits, knowing that it's either going to be a TRO or no  
10 TRO?

11 MR. NEWMAN: Thank you for the opportunity to  
12 select. Your Honor, may I confer with my client?  
13 Adknowledge's chief legal officer is in the room.

14 THE COURT: Sure. Let's take about five or ten,  
15 or whatever time you need.

16 MR. NEWMAN: I think I need five minutes.

17 THE COURT: Five minutes you've got.

18 MR. NEWMAN: Thank you, Your Honor.

19 (Recess)

20 THE COURT: Before we go forward, I would like to  
21 clarify on the possible conflict. Ms. Rice tells me she  
22 doesn't think she's ever received spam on XMission, she's  
23 certainly never unsubscribed, and she's certainly never  
24 complained. There you go.

25 So what's the plan, Mr. Newman?

1           MR. NEWMAN: Your Honor, thank you for allowing me  
2 the opportunity to confer with my client. My client advised  
3 exactly what I expected. And I've spoken with my friend,  
4 Mr. Cameron, who represents XMission, and we would be  
5 pleased to negotiate that stipulation.

6           THE COURT: Good. Let me tell you what I want you  
7 to do.

8           MR. CAMERON: Your Honor, if I may?

9           THE COURT: Of course.

10          MR. CAMERON: I apologize. Before you tell us  
11 what you would like us to do, which I assume is dismiss  
12 ourselves and see if we can't come to some language, I would  
13 like the opportunity to just provide a brief rebuttal before  
14 we break to reach a stipulation, which we're willing to  
15 attempt to accomplish.

16          THE COURT: Okay. And then you can rebut that if  
17 you want. So let's hear that. But here's what I'm thinking  
18 we're going to do. I'm going to keep a close watch on what  
19 the language is. And if you can't agree upon the language,  
20 don't go far because we'll work it out together. Once we  
21 reach the agreement, whether it's -- it should simply say  
22 that -- I don't want to let my lack of expertise intrude,  
23 but that you will inform all your publishers who use certain  
24 domain names not to send them to these domain names.

25          MR. NEWMAN: Your Honor, that's technically

1 incorrect.

2 THE COURT: That's the gist of it, but you make it  
3 happen the way it's supposed to happen.

4 MR. NEWMAN: I think Mr. Cameron and I understand  
5 what's technically correct and we'll negotiate the correct  
6 language.

7 THE COURT: Right, because I'm certainly -- I'm  
8 not in this business. And then, as far as your fears, if  
9 you've got a publisher who ignores what you say or makes a  
10 mistake, that's not going to be contempt. Contempt has to  
11 be knowingly, that you didn't tell your publisher or that it  
12 was a bad faith mistake, because I'm not in the business of  
13 finding in contempt. But let me hear from you.

14 MR. CAMERON: Your Honor, just a few minor points.  
15 I would like to borrow from Mr. Newman's own description of  
16 his services. He indicates that they represent Volkswagen  
17 as one of their advertisers, and they bring these parties  
18 together, Volkswagen as the advertiser on one side and the  
19 publisher is on the other side, and has admitted and stated  
20 that if he steps out of this, Volkswagen doesn't just deal  
21 with anybody. But has inconsistently stated that if they do  
22 step out of this, the e-mails will continue.

23 THE COURT: The e-mails might continue, but  
24 Volkswagen won't be one of the advertisers in the e-mail.

25 MR. CAMERON: That's my exact point, which is that

1 Adknowledge controls the advertiser relationships, they  
2 control the publisher relationships, they bring these  
3 together. It should be squarely within their control to  
4 stop all e-mails.

5 THE COURT: As I understand it, and, again, as  
6 Mr. Newman pointed out, I technologically am a little  
7 unsound, do the publishers send spam messages that maybe  
8 have advertisements from several advertisers?

9 MR. CAMERON: They may and they may not. They  
10 certainly do in some circumstances.

11 THE COURT: Is that what you were referring to  
12 when you said the e-mails won't stop?

13 MR. NEWMAN: Your Honor, Adknowledge is like an  
14 advertising agency. If it places an ad for Volkswagen in  
15 The New York Times, Adknowledge gets a commission and so  
16 does Volkswagen. If it doesn't, The New York Times is still  
17 delivered. It just might not have Volkswagen's ad, or  
18 perhaps with another agency. Adknowledge can't stop The New  
19 York Times from being delivered. It can only stop the ads  
20 that it places.

21 MR. CAMERON: Thank you, Derek, because that's my  
22 exact point. We believe that for a stipulated order to  
23 work, it must designate that XMission will not receive  
24 e-mails with Adknowledge links in them because, as he says,  
25 the e-mails may be delivered, and that's true. But if they

1 are, they're not going to be attributable to Adknowledge and  
2 they're not going to contain advertisements for  
3 Adknowledge's advertisers, which is the reason we're here.  
4 If we get e-mails, we can take those up with them and the  
5 other party is responsible.

6 THE COURT: How does that work? That seems pretty  
7 narrow.

8 MR. NEWMAN: Well, that doesn't work, Your Honor,  
9 because to the extent that an Adknowledge link appears, it's  
10 as a consequence of a publisher that wasn't acting properly.  
11 Perhaps we can negotiate in consequences like, for  
12 example -- I'm just thinking off the top which is unfair  
13 because I haven't spoken to my client, but maybe something  
14 with the commission or maybe actions taken against the  
15 publisher, or maybe the publisher is disclosed to XMission  
16 so XMission can take direct action. But all Adknowledge can  
17 control is the ads it places. It can't control when the  
18 publisher disregards policies and directives.

19 MR. CAMERON: I agree with that. But my point is,  
20 and I think this Court has addressed that, it's a clear and  
21 convincing standard of proof for contempt. If one, two, ten  
22 e-mails slip through with Adknowledge's links, that's not  
23 contemptible. If 65,000 e-mails come through with  
24 Adknowledge's links, I believe we would have clear and  
25 convincing evidence. We're not willing to agree to an

1 alternative method to pursue a publisher who may be Joe  
2 James in a dorm room at U.C.L.A. sending e-mails. We'll  
3 never find him. We'll never get anywhere. We'll never stop  
4 anything from that kid. But that's not the point.

5 Adknowledge controls the relationships. They are  
6 the procurer. The only possible procurer is Adknowledge in  
7 this situation. It should be possible and the order should  
8 dictate we don't receive any e-mails with Adknowledge links.  
9 If there are one or two, or ten or 15, it's not  
10 contemptible. If there's 65,000, we've got an issue.

11 THE COURT: Well, the best they can do is they  
12 tell their publishers don't send them to XMission. You  
13 won't be paid and you're risking sanctions.

14 MR. CAMERON: I believe that's partially accurate  
15 and almost complete. And of course the technological aspect  
16 of it Mr. Newman and I can discuss.

17 THE COURT: Let's make a stab at it. Do it in  
18 good faith.

19 I trust, just to clear up my belief and maybe  
20 clear up Mr. Newman's belief, you didn't knowingly  
21 misrepresent anything to me up here, did you?

22 MR. CAMERON: No. Absolutely not, Your Honor.

23 THE COURT: All right.

24 MR. NEWMAN: Your Honor, may I clarify?

25 THE COURT: Let's do.

1           MR. NEWMAN: I'm certainly not accusing  
2 Mr. Cameron of knowingly misrepresenting anything. What I  
3 said is the facts that he describes in large part are false,  
4 and I'm not imputing motive. I'm just saying they're false.  
5 I know they're false because I've worked for this client for  
6 a long time.

7           THE COURT: How about incorrect?

8           MR. NEWMAN: Incorrect, Your Honor, and I regret  
9 any misunderstanding.

10          THE COURT: Let's say just incorrect. That's a  
11 better word.

12          MR. CAMERON: May I address one point? This is  
13 logistical --

14          THE COURT: Yes, you may.

15          MR. CAMERON: -- forward thinking, and I know  
16 we'll schedule an injunction hearing. There was issue made  
17 in the briefing that we haven't produced the e-mails. We  
18 have those and we'll send them to opposing counsel today.  
19 But we need to find a way to produce those to the Court that  
20 will not bury the Court's system. We cannot electronically  
21 file 65,000 e-mails. That's a couple hundred thousand  
22 pages.

23          THE COURT: How are you going to give them?

24          MR. CAMERON: What we propose, and this is what  
25 we've done in many situations before, is we take the raw



1 e-mail file, which is the original, it's the best evidence,  
2 it's not a paper copy, it's not a printout, it's exactly how  
3 it was received, and we host that on one of our servers and  
4 provide a link for them to download it. It's approximately  
5 two gigs of data, which isn't significant. They can then  
6 download those raw e-mails and they can view them in any  
7 e-mail browser that they want to use. We can provide those  
8 raw e-mails on a data DVD to the Court so that they're here.  
9 I believe that will probably be the best. And certainly  
10 with Judge Nuffer that's what we did.

11 THE COURT: If you did it with Judge Nuffer, well,  
12 anything Judge Nuffer can do, I also can do. What I just  
13 want to know, though, is my only concern would have been are  
14 we capable with our capacities, and if we are, if Judge  
15 Nuffer was able to access it, I can do the same because I  
16 use the same stuff.

17 MR. NEWMAN: Your Honor, if we come to this  
18 agreement, there's no need for a preliminary injunction  
19 hearing. What that would involve is hours and hours and  
20 hours and hours of attorney and staff time to argue whether  
21 there should be an order about something that's already been  
22 agreed upon which there's been no violation. If there's a  
23 violation, than perhaps they bring their motion for a  
24 preliminary injunction. But short of a violation, this  
25 agreement should resolve the issue.

1 THE COURT: It depends on what you agree. Are you  
2 saying this is in perpetuity?

3 MR. NEWMAN: Yes, because that's how the  
4 suppression list works in any regard.

5 THE COURT: What do you think about that?

6 MR. CAMERON: Your Honor, I believe we have  
7 damages with respect to the e-mails that have already been  
8 sent, nonstatutory, that need to be addressed. I think  
9 there are other evidentiary questions that are best resolved  
10 through a preliminary injunction hearing.

11 THE COURT: Why a preliminary injunction hearing  
12 if we have a trial?

13 MR. CAMERON: That's a good question, Your Honor.

14 THE COURT: Think that over too, because I usually  
15 don't award money, although I certainly have.

16 MR. CAMERON: Which we wouldn't be requesting.  
17 I'm merely discussing the damage. Frankly, the irreparable  
18 harm, that needs to be addressed.

19 THE COURT: Your irreparable harm would be  
20 rectified by my stopping it. Money comes up in a trial.

21 MR. SCHMUTZ: Your Honor, I think if the language  
22 and the scope of this stipulated order would track the scope  
23 of a preliminary injunction, if that's what's being  
24 suggested by Mr. Newman, we can work on that, if it would  
25 last through the pendency of the trial.

1 THE COURT: If you could reach something with or  
2 without my help that will last until the issues are resolved  
3 at trial, then you're right.

4 MR. SCHMUTZ: We're fine with that.

5 THE COURT: So try and go to work. You know how  
6 to reach me.

7 MR. CAMERON: I'm not sure we do. Do we have the  
8 best phone number to call and let the Court know?

9 THE COURT: Do you want that to be you, Anne?

10 Ms. Rice will give you her number.

11 MR. SCHMUTZ: Your Honor, may I say one more thing  
12 just to advise the Court? I have a hearing in Provo at two  
13 and I may not be here when you return. I just want you to  
14 know that is the reason.

15 THE COURT: Hopefully I'm not going to return.  
16 Hopefully I just sign something in my office. Okay. But  
17 we'll see.

18 Now I want you to please give it your best shot,  
19 best effort, all of that. If not, we'll be back here later  
20 this afternoon and tomorrow, if necessary.

21 We'll be in recess.

22 (Whereupon, the proceeding was concluded.)  
23  
24  
25

## C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

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